



## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R03-OAR-2020-0522; FRL-9666-02-R3]

#### **Air Plan Approval; Delaware; Amendments to Control of Volatile Organic Compounds**

#### **Mobile Equipment Repair and Refinishing Rule Regulation**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving a state implementation plan (SIP) revision submitted by the Delaware Department of Natural Resources and Environmental Control (DNREC). This SIP revision consists of the 2010 amendments to the State of Delaware's Mobile Equipment Repair and Refinishing (MERR) regulations to incorporate the Ozone Transport Commission's (OTC) 2009 Motor Vehicle and Mobile Equipment Non-Assembly Line Coating Operations regulations (MVMERR) model rule. The MVMERR rule establishes updated volatile organic compounds (VOC) content limits for coating and cleaning solvents used in vehicle refinishing and standards for coating application, work practices, monitoring, and recordkeeping. EPA is approving these revisions to the Delaware SIP in accordance with the requirements of the Clean Air Act (CAA).

**DATES:** This final rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2020-0522. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available

docket materials are available through <https://www.regulations.gov>, or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

**FOR FURTHER INFORMATION CONTACT:** Sean Silverman, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814-5511. Mr. Silverman can also be reached via electronic mail at [silveman.sean@epa.gov](mailto:silveman.sean@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

On February 8, 2021 (86 FR 8561), EPA published a notice of proposed rulemaking (NPRM) for the State of Delaware. In the NPRM, EPA proposed approval of a formal SIP Revision submitted on May 6, 2020 on behalf of the State of Delaware by DNREC.

Ozone is formed in the atmosphere by photochemical reactions between VOCs and nitrogen oxides (NO<sub>x</sub>) in the presence of sunlight. In order to reduce these ozone concentrations, the CAA requires control of certain VOC and NO<sub>x</sub> emission sources to achieve emission reductions in ozone nonattainment areas classified as Moderate and above. The 2002 MERR Model Rule was developed to reduce VOC emissions from automotive coatings and cleaning solvents associated with non-assembly line refinishing or recoating of motor vehicles, mobile equipment, and their associated parts and components. This rule was originally approved by EPA into Delaware's SIP on November 22, 2002 (67 FR 70315) as part of a regional effort to attain and maintain the 1-hour ozone national ambient air quality standards (NAAQS).

The OTC 2009 MVMERR Model Rule<sup>1</sup> is a revision of the 2002 MERR Model Rule developed by the OTC. The OTC's 2009 MVMERR Model Rule is based upon the California Air Resources Board's (CARB) Suggested Control Measure (SCM) for Automotive Coatings,

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<sup>1</sup> The OTC 2009 MVMERR Model Rule is available online at <https://otcair.org/document.asp?fview=modelrules> and included in the docket for this rulemaking, available online at <https://www.regulations.gov>, Docket ID: EPA-R03-OAR-2020-0522.

published October 2005. In order to keep Delaware's regulations up to date with the OTC's 2009 MVMERR Model Rule, Delaware revised its regulations, found at 7 Del. Admin. Code 1124, Control of Volatile Organic Compound Emissions; Section 11.0 Mobile Equipment Repair and Refinishing (Delaware's 2010 amended MERR rule), on September 17, 2010. Delaware then submitted these 2010 amendments to EPA as a SIP revision on May 6, 2020.<sup>2</sup>

## **II. Summary of SIP Revision and EPA Analysis**

EPA has reviewed Delaware's May 6, 2020 MERR SIP submittal in the context of the requirements of CAA Sections 176a and 184 (interstate transport commissions and control of interstate ozone air pollution respectively). Delaware has amended 7 Del. Admin. Code 1124 Control of Volatile Organic Compound Emissions Section 11.0 Mobile Equipment Repair and Refinishing to meet these requirements in its May 6, 2020 MERR SIP submittal. In this action, EPA is determining that the submitted MERR SIP meets the above-cited requirements of the CAA.

Other specific requirements of Delaware's May 6, 2020 submittal and the rationale for EPA's proposed action are explained in the NPRM, and will not be restated here.

## **III. EPA's Response to Comments Received**

EPA received five sets of comments in response to the NPRM that are available in the docket for this action. Of these five sets of comments, one was outside of the scope of this rulemaking, and another was supportive, neither of which require a response by EPA. EPA provides summaries of the three sets of significant adverse comments and our responses below.

*Comment 1:* One commenter claims that the DE MERR Rule should be disapproved due to rounding error that results from converting the regulatory VOC limits from pounds per gallon (lb/gal) to grams per liter (gm/l) and vice versa. The commenter uses the example that

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<sup>2</sup> During a recent internal review of the Delaware SIP, DNREC discovered that it had never submitted the 2010 Delaware regulatory changes adopting the 2009 OTC MVMERR Model Rule to EPA as a SIP revision. DNREC therefore submitted this SIP revision in May 2020 so that the EPA-approved SIP would correctly reflect the Delaware regulations.

converting “5.5 pounds per gallon to grams per liter we get 659.045 grams per liter” and converting “660 grams per liter to pounds per gallon we get 5.50797 pounds per gallon.” The commenter goes on to say “allowing these fractional amounts to be rounded off EPA is deceiving the public and allowing harmful VOC compounds to be emitted into the atmosphere. EPA can’t allow dual [sic] limits in different units unless those units of measure are exactly equal.”

*Response 1:* EPA does not agree that the SIP revision should be disapproved due to minor discrepancies that arise in table 11-1 which converts imperial units to metric units. The SIP revision explicitly defines the VOC Coating Regulatory content in equation 11-1 and states that units are in gm/l. Furthermore, certain EPA regulations also give limits in both imperial and metric units. Examples can be found in EPA’s New Source Performance Standards (Standards of Performance for Electric Utility Steam Generating Units, 40 CFR part 60 subpart Da) and National Emissions Standards for Hazardous Air Pollutants (Surface Coating of Metal Furniture: National Emission Standards for Hazardous Air Pollutants, 40 CFR part 63 subpart RRRR). In these examples and in this SIP revision, these limits would be better conceived of as a limit defined by a range of possible compliant concentrations with any concentrations within the range (whether measured in imperial or SI units) representing compliance, rather than “dual [sic] limits.” However, in all cases the limits in Delaware’s MERR are more stringent than the corresponding limits in the current SIP. This SIP revision is therefore approvable because it increases the stringency of the Delaware SIP.

*Comment 2:* The commenter asserts that EPA cannot approve the DE MERR rule on grounds that it “has yet to approve previous fixes to the same rule which address impermissible Startup Shutdowns and Malfunctions as detailed in EPA’s 2015 SIP call.” The commenter asserts that “EPA must address the impermissible exceptions detailed in the SIP call for Rule 1124 before it adds new rules to the SIP otherwise these new rules can just be ignored in the same way....”

*Response 2:* The commenter asserts that EPA must resolve issues relating to Startup, Shutdown, and Malfunction (SSM) as described in the 2015 SIP call (80 FR 33840, June 12, 2015) before it can modify regulations pertaining to Delaware's MERR. The commenter correctly notes that an SSM provision subject to the 2015 SIP call is contained in Title 7 of the Delaware Administrative Code, Regulation 1124 (Control of Volatile Organic Compound Emissions), Section 1.0 (General Provisions), subsection 1.4. 7 Del. Admin. Code Section 1124-1.4. This SSM subsection is not addressed in this rule. This rule pertains solely to revisions to Delaware Code section 11.0 (and its various subsections), and comprises SIP-strengthening changes to Delaware's rules that pertain to "Mobile Equipment Repair and Refinishing." Revisions to address the SSM provision in 7 Del. Admin. Code Section 1124-1.4 have been submitted to EPA and will be addressed in a separate action.

It is worth noting the commenter does not articulate any reason why EPA must address the SSM provision before EPA can act on this SIP revision beyond drawing an analogy to hypothetical traffic regulations, and EPA does not know of any policy or legal reason why we need to await resolution of an SSM provision contained in a different subsection of the same regulatory chapter prior to taking action on these SIP-strengthening measures.

The updates to the MERR rule in 7 Del. Admin. Code Section 1124-11 contain no SSM provisions or changes relating to SSM. Nothing in 7 Del. Admin. Code Section 1124-11 was subject to the 2015 SIP call cited by the commenter. Furthermore, the approval of the MERR provisions in 7 Del. Admin. Code Section 1124-11 will be SIP strengthening independent of the outcome of action pertaining to 7 Del. Admin. Code Section 1124-1.4. The new SIP strengthening requirements Delaware added to section 11 include reduced VOC coating contents, specifications for the type of equipment that can be used for application techniques and the addition of requirements to document the manufacturer and VOC content of coatings. EPA believes that delaying the federal enforceability of these benefits through SIP approval of the MERR rule revisions will delay potential environmental benefits of having the strengthened

provisions in the SIP. EPA therefore does not view this comment as a basis to alter the proposed action and is finalizing approval of the MERR as a revision to the Delaware SIP.

*Comment 3:* The commenter asserts EPA cannot approve this SIP because this regulation will increase the cost for businesses in Delaware resulting from “increased chemical use by some companies that are not located in Delaware, thereby driving up costs for Delaware businesses, which must bear the cost of treating the chemicals...” The commenter goes on to suggest that the resulting cost outweighs the benefits.

*Response 3:* EPA disagrees that the MERR SIP Revision should be disapproved based on the reasons given by the commenter. Although the commenter speculates that the SIP revision will result in “increased chemical use by some companies that are not located in Delaware, thereby driving up costs for Delaware businesses, which must bear the cost of treating the chemicals” the commenter does not offer any factual support for or data to back up this assertion. Comments that are no more than broad assertions that an agency “got it wrong” do not provide a basis for EPA to change its decision. See, e.g., *International Fabricare Institute v. E.P.A.*, 972 F.2d 384 (D.C. Cir. 1992). Furthermore, this SIP revision in no way impacts treatment of materials, so the mechanism suggested by the commenter for driving up costs is unrelated to the revisions as written. Therefore, EPA disagrees with the commenter that this comment provides a basis for disapproving this SIP Revision.

#### **IV. Final Action**

EPA is approving the 2010 amended MERR rule as a revision to the Delaware SIP. EPA has determined that Delaware’s 2010 amended MERR rule is consistent with the requirements and limits in the 2009 OTC MVMERR Model Rule. Therefore, its approval into the Delaware SIP would result in the VOC reductions in the 2010 amended MERR rule becoming federally enforceable and strengthen the SIP.

#### **V. Incorporation by Reference**

In this document, EPA is finalizing regulatory text that includes incorporation by

reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of revisions to 7 Del Admin. Code 1124 Control of Volatile Organic Compound Emissions Section 11.0 Mobile Equipment Repair and Refinishing described in the amendments to 40 CFR part 52 set forth below. EPA has made, and will continue to make, these materials generally available through <https://www.regulations.gov> and at the EPA Region III Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rule of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.<sup>3</sup>

## **VI. Statutory and Executive Order Reviews**

### *A. General Requirements*

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

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<sup>3</sup> 62 FR 27968 (May 22, 1997).

- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

#### *B. Submission to Congress and the Comptroller General*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the



U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

*C. Petitions for Judicial Review*

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action.

This action pertaining to revisions to 7 Del. Admin. Code 1124 Control of Volatile Organic Compound Emissions Section 11.0 Mobile Equipment Repair and Refinishing may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: March 23, 2022

Diana Esher  
Acting Regional Administrator,  
Region III.

For the reasons stated in the preamble, the EPA amends 40 CFR part 52 as follows:

**PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

1. The authority citation for part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

**Subpart I—Delaware**

2. In § 52.420, the table in paragraph (c) is amended by revising the entry “Section 11.0” under “1124 Control of Volatile Organic Compound Emissions” to read as follows:

**§ 52.420 Identification of plan.**

\* \* \* \* \*

(c)\* \* \*

State regulation (7 DNREC 1100)	Title/subject	State effective date	EPA approval date	Additional explanation
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<b>1124 Control of Volatile Organic Compound Emissions</b>				
* * *	* * *	* * *	*	
Section 11.0	Mobile Equipment Repair and Refinishing	10/11/2010	[insert date of publication in the Federal Register], [insert Federal Register citation]	
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